Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

JOSEPH J. LAVODIE, SUCCESSOR DIRECTOR-TRUSTEE FOR 3011 CORPORATION, T/A U.S. BOOKS; AND L.R. NEWS, INC., T/A EDGEWOOD BOOKS,

Petitioners,

v.

JOSEPH I. CASSILLY, INDIVIDUALLY AND AS STATE'S ATTORNEY, HARFORD COUNTY, MARYLAND; M. TERESA GARLAND, INDIVIDUALLY AND AS ASSISTANT STATE'S ATTORNEY, HARFORD COUNTY, MARYLAND; AND J.R. TAYLOR, INDIVIDUALLY AND AS DEPUTY SHERIFF, HARFORD COUNTY, MARYLAND,

Respondents,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT TAYLOR'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Is Deputy Sheriff Taylor entitled to qualified immunity with respect to his role in the preparation and execution of search warrants for two adult bookstores, where: the warrants were factually complete and accurate; Taylor presented the warrant applications and affidavits to the state's attorney for a determination of the sufficiency of the probable cause showing; and Taylor then presented the approved applications and affidavits to a state court judge, who reviewed them, determined they sufficiently established probable cause and signed and issued the warrants?

2. Is Taylor entitled to qualified immunity with respect to his role in the preparation and execution of search warrants for two adult bookstores, where the warrants complied with all of the requirements of the Fourth Amendment and where the bookstores deliberately destroyed or caused the spoilation of all of the evidence necessary to determine obscenity and thereby whether any of the bookstores' First Amendment rights were violated?

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STATEMENT OF THE CASE

Petitioner, Joseph J. LaVodie, is the Successor Director-Trustee for two adult bookstores (the "adult bookstores"), 3011 Corporation and L.R. News, Inc.. Respondent, J.R. Taylor ("Taylor"), is a deputy of the Sheriff of Harford County, Maryland.

This case arises out of a multi-count complaint that the adult bookstores and several other plaintiffs filed in the United States District Court for the District of Maryland against the Harford County State's Attorney, one of his assistant state's attorneys, the Sheriff of Harford County, twelve deputy sheriffs and other defendants subsequently dismissed from the case. The adult bookstores and the other plaintiffs seek monetary relief for the actions that defendants allegedly took in applying for and executing search and seizure warrants which authorized the search and seizure of the two adult bookstores.

On July 24, 1997, the United States District Court (Black, J.) granted in part and denied in part the summary judgment motions filed by Taylor and the other defendants, holding that they were entitled to qualified immunity as to most of the claims pending against them but also finding that they were not entitled to qualified immunity with respect to the claims of the adult bookstores which challenged their role in the preparation and execution of the warrants. Taylor took an immediate appeal from the United States District Court's denial of immunity pursuant to *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

The Fourth Circuit Court of Appeals reversed the ruling of the United States District Court. It held that in light of the undisputed material facts concerning the actions of

Taylor, he was clearly entitled to qualified immunity. In the Petition for Certiorari, the adult bookstores seek to have the holding of the Fourth Circuit reversed.

SUMMARY OF THE ARGUMENT

The Fourth Circuit Court of Appeals correctly followed and applied the long-standing precedents of this Court to grant Taylor qualified immunity from the claims of the adult bookstores.

Taylor's conduct with respect to the procurement and execution of the search warrants for the adult bookstores was objectively reasonable as a matter of law. The warrant applications and affidavits prepared by Taylor were factually accurate and set forth in detail the places to be searched and the items to be seized. Taylor submitted the applications, the supporting affidavits and the warrants to the Harford County State's Attorney for review and approval. The state's attorney advised Taylor that the warrant packages made a legal sufficiency showing of probable cause and otherwise were legally sufficient. Taylor then submitted the approved applications, affidavits and warrants to a state court judge, who reviewed and approved them for sufficiency of the probable cause determination and issued the warrants for the adult bookstores which were executed by Taylor and others. Under the principles announced by this Court in *Malley v. Briggs*, 475 U.S. 335 (1986); *Massachusetts v. Sheppard*, 468 U.S. 981 (1984); and *United States v. Leon*, 468 U.S. 897 (1984), this Court has found as a matter of law that conduct directly analogous to Taylor's conduct entitles a police officer to qualified immunity from §1983 claims predicated on the

alleged deficiency of the warrants, even if the warrants actually were constitutionally deficient.

The search warrants, which adopted and incorporated the applications and affidavits supporting their issuance, complied with all of the requirements of the Fourth Amendment. In light of the First Amendment presumption of the non-obscenity of adult pornography, the adult bookstores contend that the warrants and searches conducted pursuant thereto were unconstitutional because the warrants were issued and executed prior to the utilization of a procedure designed to focus searchingly on the question of the obscenity of the materials for which the warrants authorized seizure. Even if entitlement to such a procedure was clearly established as a matter of law, entitlement to that procedure hinges upon whether the materials at issue are obscene. There is no entitlement to that procedure if the materials are obscene. As a general matter, the adult bookstores should bear the burden of proving that the materials at issue were not obscene as part of their *prima facie* civil case for monetary damages. Even if the warrant applicant is saddled with the initial burden of proving the obscenity of the materials which were seized, the applicant, in this case Taylor, should be relieved of that burden because the adult bookstores deliberately destroyed all of the evidence (i.e., the magazines, journals and video jackets) necessary to establish obscenity. The adult bookstores cannot be allowed to obtain the benefit of a presumption of non-obscenity when their deliberate acts caused the purposeful destruction of the only evidence available to Taylor to establish the obscenity of the items seized and thus his defense that his conduct did not infringe on any of the constitutional rights of the adult bookstores.

STATEMENT OF FACTS

This case has its origins in the application for and execution of search and seizure warrants for the two adult bookstores. The warrants were issued by the appropriate state court after a state judge reviewed the search warrant applications and supporting affidavits and determined that they supported the issuance of the warrants on which the claims of the adult bookstores are predicated.

In 1989, the Harford County State's Attorney, in conjunction with the Harford County Sheriff's Office, began an investigation into whether the adult bookstores were renting or selling sexually oriented video films, books, magazines, sexual aids and related materials in violation of Maryland's criminal display statute, Md. Code Ann. Art. 27, §416D. In connection with the investigation, Harford County State's Attorney Joseph Cassilly ("Cassilly") met with prosecutors and investigators from the Baltimore County State's Attorney's Office and the Baltimore County Police Department who had conducted a similar criminal investigation and prosecution of an adult bookstore located in Baltimore County. Cassilly obtained information from the Baltimore County officials, including copies of the application, affidavit and search and seizure warrant they used, for purposes of planning the investigation and prosecution of the adult bookstores.

After those initial meetings with Baltimore County, Taylor was assigned as the lead deputy in the investigation of the adult bookstores. Cassilly and Taylor met several times to discuss how to build probable cause for search and seizure warrants for the adult bookstores and how to prepare the warrant applications and supporting affidavits. Cassilly

advised Taylor to pattern his investigation after the investigation conducted by the Baltimore County officials and to pattern the warrant applications and affidavits after the samples Cassilly had obtained from Baltimore County.

Taylor visited each bookstore in civilian clothes and observed the location and identifying characteristics of the two stores, including how materials were displayed and how business was transacted. Taylor also purchased two magazines in each store. Taylor then met with Cassilly to discuss what he had done and to determine whether he had developed sufficient factual information to establish probable cause and to obtain warrants. Cassilly advised Taylor that he had sufficient information, so Taylor prepared warrant applications and affidavits for the adult bookstores. After preparing the warrant applications, supporting affidavits and warrants, Taylor submitted them to Cassilly for Cassilly's review and approval. Cassilly approved the warrant packages, finding that they were legally sufficient and made a sufficient showing of probable cause to obtain search and seizure warrants for both adult bookstores.

Taylor is a trained law enforcement officer. He has no legal training. That is why he relied on the guidance, advice and expertise of Cassilly in the preparation of the warrant packages which he submitted to the court. Taylor felt particularly confident in relying on the advice of Cassilly because Cassilly had been a prosecutor for over a decade and had provided recruit class training and in-service training on search and seizure warrant issues to deputies and prospective deputies of the Harford County Sheriff's Office. Thus, Taylor perceived that Cassilly was particularly capable and well-

versed in the legalities of search and seizure warrants and procedures.

On June 9, 1989, Taylor filed with the Circuit Court for Harford County, Maryland the affidavits and applications for the search and seizure warrants for the adult bookstores. Taylor appended to each application and affidavit the front and back covers of the two magazines he had purchased at each store. The applications and affidavits described in explicit detail the location of the adult bookstores, the criminal display law under which evidence collection was sought through the warrant, the places to be searched, the contents of the covers of the two magazines purchased from the stores, the types of materials displayed at the stores and the types of materials for which the warrants were to authorize seizure.

A state court judge reviewed and approved the warrant application for each adult bookstore and issued signed warrants for each bookstore. The warrants provided the statutory definition of the Maryland criminal display laws, a violation of which provided grounds for the issuance of the warrants. The warrants particularly described the location and layout of each bookstore and stated that the judge was:

> [S]atisfied that there is probable cause to believe that there is now being displayed for advertising purposes and sold for commercial gain, books, magazines, photographs, films and posters which depict sadomasochistic abuse, sexual conduct, and sexual excitement on the premises hereinbefore described and that the foregoing grounds for issuance of the Search Warrant exists [sic].

The warrants incorporated the applications and affidavits and stated that the applications and affidavits provided the probable cause for the warrant issuance.

The warrants were executed on June 13, 1989.

REASONS FOR DENIAL OF THE PETITION FOR CERTIORARI

The adult bookstores suggest that the Fourth Circuit ignored the precedents of this Court when it ruled that Taylor was immune from their claims. To the contrary, the Fourth Circuit correctly applied the precedents of this Court in holding that Taylor enjoyed a qualified immunity. The adult bookstores have not argued that there is any conflict between the circuits which necessitates the grant of their petition. They have not argued that any compelling public interest necessitates the grant of the petition. This case does not merit the scrutiny of this Court.

A. The Fourth Circuit Correctly Applied Long-Standing Precedents Of This Court When It Determined That Taylor's Conduct Was Objectively Reasonable In Light Of Clearly Established Law And Ruled That He Was Entitled To Qualified Immunity.

The United States District Court misapplied the qualified immunity test of *Malley* in determining that Taylor did not enjoy qualified immunity from the §1983 claims of the bookstores in Counts One and Five of the Complaint, which were predicated on the alleged infirmity of the search

warrants. The United States District Court denied Taylor qualified immunity because the materials for which the warrants authorized seizure were not subject to a procedure designed to focus searchingly on the question of obscenity, which the United States District Court perceived was in violation of clearly established law.[1] The United States District Court never considered the undisputed material facts relative to Taylor's conduct, and it failed to consider the objective reasonableness of Taylor's conduct. When the Fourth Circuit made a *de novo* review of the summary judgment record, it found that Taylor clearly was entitled to qualified immunity based on the long-standing principles established by this Court.

In *Malley*, this Court held:

> [T]he same standard of objective reasonableness that we applied in the context of a suppression hearing in *Leon, supra*, defines the qualified immunity accorded an officer whose request for a warrant allegedly caused an unconstitutional arrest. Only where the warrant application is so lacking indicia of probable cause as to render official belief in its existence unreasonable, *Leon, supra*, at 923,

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[1] In *A Quantity of Copies of Books v. Kansas*, 378 U.S. 206 (1964), and *Marcus v. Search Warrants of Property at 104 East Tenth Street, Kansas*, 367 U.S. 685 (1961), this Court held that a search warrant which authorized a mass seizure of published materials prior to a procedure designed to focus searchingly on the question of obscenity was unlawful. *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 62-63 (1989).

> 104 S.Ct. at 3421, will the shield of immunity be lost. (Footnote omitted.)

Malley, 475 U.S. at 345. Thus, the test of objective reasonableness applied by the Court in *Leon* is the test to follow in evaluating Taylor's entitlement to qualified immunity in this case.

In *Leon*, this Court developed the below criteria to evaluate when it would be unreasonable for an officer who obtained a warrant to believe that the warrant established probable cause:

> 1. When the officer knew, or except for his reckless disregard of the truth would have known, that the information in the affidavit was false;
>
> 2. When the magistrate or judge who issued the warrant "wholly abandoned his judicial role in the manner condemned in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 99 S.Ct. 2319, 60 L.Ed.2d 920 (1979)";
>
> 3. When the warrant application was "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable"; or
>
> 4. When the warrant was "so facially deficient -- i.e., in failing to particularize the place to be searched or the things to be seized -- that executing officers

> could not reasonably presume it to be valid. *Cf. Massachusetts v. Sheppard*, 468 U.S. at 988-991, 104 S.Ct. at 3428-3430."

Leon, 468 U.S. at 923.

In *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979), the town justice issued a search warrant which authorized the seizure of unidentified items which the court independently determined to violate New York's obscenity statute. The justice who issued the warrant actually accompanied the police to the bookstore and examined the materials in the store, making on-the-spot determinations of what materials were obscene and thus could be seized. The police officers seized all of the materials from the bookstore that the town justice determined were obscene during the search. This Court invalidated the search warrant because it authorized the seizure of items that had not been determined to be obscene prior to its issuance and suppressed the evidence seized at the direction of the town justice while he was at the bookstore. *Lo-Ji Sales, Inc.*, 442 U.S. at 326. This Court opined that the justice had failed to fulfill his role as a neutral and detached judicial officer, removed from the often competitive enterprise of ferreting out crime under the pressure of time constraints. *Id.* This Court found that it was improper for a search warrant to be issued by a justice who became a part of, if not the leader of, the search party because the justice had become an adjunct of the law enforcement officers. *Lo-Ji Sales, Inc.*, 442 U.S. at 327.

In *Massachusetts v. Sheppard*, 468 U.S. 981 (1984), the sole issue before this Court was whether the police officers reasonably believed that the search they conducted was

authorized by a valid warrant. While the affidavit and application for the warrant particularly described the items to be seized, the warrant itself failed to describe the items to be seized and, therefore, was constitutionally deficient and technically invalid. This Court recited several factors in support of its finding that the officer's conduct in the procurement and execution of the warrant was objectively reasonable. First, the officer who prepared the affidavit had it reviewed by the district attorney for a determination of the sufficiency of the probable cause showing. Then, the officer presented the affidavit to a judge. The judge reviewed the affidavit and concluded that it established sufficient probable cause for the search. The officer advised the judge that because it was a Sunday, he only had a drug search application and warrant form available, not the form normally used for a homicide search. The officer suggested that there may be some problems with the form the officer had presented to the judge. The judge reviewed the forms and advised the officer that the judge would make any necessary changes, which the judge appeared to do while the officer waited for the judge to execute the warrant. This Court concluded that:

> [T]he police conduct in this case clearly was objectively reasonable and largely error-free. An error of constitutional dimensions may have been committed with respect to the issuance of the warrant, but it was the judge, not the police officers, who made the critical mistake.

Sheppard, 468 U.S. at 990. This Court also noted that:

> In Massachusetts, as in most jurisdictions, the determinations of a judge acting within his jurisdiction, even if erroneous, are valid and binding until they are set aside under some recognized procedure. (Citations omitted.)

Sheppard, 468 U.S. at 990. The Court implied that the officers, having a warrant which appeared to be valid, were duty bound to execute it.

The undisputed facts in this case overwhelmingly evince that Taylor's conduct in the procurement and execution of the warrants at issue was objectively reasonable under the applicable criteria of this Court. Under such circumstances, the objective reasonableness determination is ultimately a question of law for the trial court to determine. *Pritchett v. Alford*, 973 F.2d 307, 313 (4th Cir. 1992); *Torchinsky v. Siwinski*, 942 F.2d 257, 260 (4th Cir. 1991).

Shortly after Taylor was assigned primary responsibility for assisting the State's Attorney's Office in the investigation of the adult bookstores, he met with Cassilly to inquire about what work to undertake in order to develop the probable cause necessary to obtain valid search warrants for the bookstores. Cassilly explained to Taylor that Cassilly had spoken with prosecutors and police officers in Baltimore County who had conducted a very similar type of investigation and prosecution. Cassilly provided Taylor with a copy of the warrant application and affidavit and the warrant used by Baltimore County in its investigation. In light of Cassilly's direction, Taylor patterned his investigatory effort in order to develop the information necessary to prepare an affidavit and

application similar to that prepared by the Baltimore County police detectives.

Taylor, in civilian clothes, visited the adult bookstores and made observations about the location and identifying characteristics of each store, the type of materials displayed, how materials were displayed and how business was transacted. In addition, he purchased two magazines at each store. After conducting his investigation and purchasing the magazines, Taylor met with Cassilly to discuss whether Cassilly felt Taylor had conducted a sufficient investigation to establish probable cause and to prepare applications and affidavits for search warrants for the two stores. Cassilly advised that Taylor had conducted a sufficient enough investigation and directed him to prepare the applications, supporting affidavits and warrants patterned after those prepared by Baltimore County.

After preparing the warrant packages, Taylor showed them to Cassilly. Cassilly advised Taylor that the applications, the supporting affidavits and the warrants were legally sufficient and were ready for submission to the court.

Taylor relied on and interpreted Cassilly's approval of the applications and affidavits as signifying that they made a sufficient showing of probable cause and were in all other respects legally sufficient to obtain a valid search and seizure warrant for the bookstores. Cassilly knew that the deputies looked to the State's Attorney's Office to make sure that the legal requirements necessary to obtain a valid search and seizure warrant were satisfactorily completed. Cassilly knew that Taylor considered Cassilly's approval as confirmation that the warrant packages were legally sufficient.

At the time Cassilly approved the affidavits and applications for the bookstores, he had been working at the State's Attorney's Office for approximately 12 years, and he had been the state's attorney for approximately 6 years. Not only was he the state's attorney, but he also was the person who provided training to the deputies on Fourth Amendment search and seizure issues on a routine basis. Cassilly was not an inexperienced assistant state's attorney. There has not been any suggestion that Taylor tried to hoodwink a junior assistant state's attorney into approving a defective warrant application. To the contrary, Taylor knew that Cassilly provided the Sheriff's Office with training on search and seizure issues and, therefore, implicitly trusted his guidance with respect to the preparation and approval of the warrant packages at issue in this case. Taylor's reliance on Cassilly was objectively justified. *Torchinsky*, 942 F.2d at 263 (the Fourth Circuit found it was reasonable for a police officer to rely on the advice of his supervisor, who was a certified instructor of criminal investigative techniques, a 13-year veteran of detective work and had expressed belief that the officer had established probable cause).

Taylor submitted the applications and affidavits to the Honorable Cypert O. Whitfill, the judge who signed the warrants. Judge Whitfill was and still is a sitting judge of the Circuit Court of Maryland for Harford County. Unlike the town justice in *Lo-Ji Sales, Inc.*, Judge Whitfill was not involved in the investigation of the bookstores. Judge Whitfill reviewed the affidavits and applications as a neutral and detached judicial officer of the State of Maryland and then issued the warrants.

Taylor obtained a warrant from a neutral judge, and he is entitled to receive considerable protection from suit under 42 U.S.C. §1983. *Torchinsky*, 942 F.2d at 262. Otherwise, the threat of liability will force officers to continually second-guess the considered decisions of magistrates, which will in turn promote delay in the execution of warrants and alter the proper allocation of law enforcement functions. *Id.* Moreover, if a reasonable mistake is actionable, difficult questions of discretion always will be resolved in favor of inaction and effective law enforcement will be lost. *Torchinsky*, 942 F.2d at 261.[2]

The search warrants for the two bookstores (which adopted and incorporated the applications and affidavits) were seven and eight pages in length respectively (exclusive of attachments). The affidavits and applications, in great detail, described the names and locations of each bookstore, the crime that was being investigated, the places to be searched and the materials for which seizure was authorized. Taylor double-checked his investigatory notes to make sure that all of the

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[2]The Fourth Circuit also recognizes that the qualified immunity defense affords tolerance to good faith mistakes of judgment traceable to unsettled law, faulty information or contextual exigencies as it was deliberately designed to protect all but the plainly incompetent or those who knowingly violate the law. *Pritchett*, 973 F.2d at 313. The bookstores are questioning Taylor's conduct because he relied on the probable cause determination of a neutral and detached judge and the assurances of the state's attorney that his warrant application and affidavit made a legally sufficient showing of probable cause. The qualified immunity defense exists to prevent such second-guessing.

factual statements and descriptions in the applications and affidavits were accurate and correct. The owners and managers of the adult bookstores admitted that there were not any factual misstatements in the affidavits.

Taylor's conduct in this case is directly analogous to the conduct this Court held to be objectively reasonable as a matter of law in *Sheppard*. Taylor scrupulously adhered to the basic parameters of the Fourth Amendment's requirements for a warrant affidavit and application (e.g., packages identified with particularity the places to be searched and described with reasonable particularity the materials to be seized). There is no suggestion that Taylor lied or included any false or misleading information in the warrant packages he prepared. Taylor took reasonable steps to verify the accuracy of the information in the warrant packages he prepared and presented them to a neutral and detached judicial officer. Taylor satisfied all of the requirements of the Fourth Amendment.

An officer cannot be expected to be an attorney. An officer should not be expected to research the law and to ascertain and understand the nuances of the First Amendment's overlay on the Fourth Amendment requirements for a search warrant for an adult bookstore. Taylor was not an attorney and did not have any such training. Certainly, it is unreasonable to expect Taylor to appreciate the First Amendment nuances and their implications with respect to the search warrants at issue in this case. Even if, for sake of argument, the search warrants in this case are assumed to have been constitutionally defective, any mistake of constitutional dimension was made by the judge and/or the state's attorney, not by Taylor. *Accord*, *Anderson v. Creighton*, 483 U.S. 635, 641 (1987) (in the context of a warrantless search, this Court

has recognized "that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and [has] indicated that in such cases those officials - like other officials who act in ways they reasonably believe to be lawful - should not be held personally liable.")

The qualified immunity defense protects "all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341. Taylor's conduct was objectively reasonable and largely error-free. *Sheppard*, 468 U.S. at 989-90. Taylor enjoys qualified immunity from the claims of the bookstores under Counts One and Five of the Complaint.

B. The Adult Bookstores Should Not Be Afforded Any Presumption Of Non-Obscenity Where They Have Deliberately Destroyed The Only Evidence From Which The Obscenity Determination Can Be Made.

Obscene materials are not protected by the First Amendment. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 224 (1990); *Miller v. California*, 413 U.S. 22, 23 (1973); *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 376 (1971); *United States v. Reidel*, 402 U.S. 351, 354 (1971); *Roth v. United States*, 354 U.S. 476, 485 (1957). It follows naturally, therefore, that obscene materials may be seized as long as the requirements of the Fourth Amendment are satisfied. The Fourth Amendment requires only that a search warrant be supported by probable cause predicated on an affidavit particularly describing the place to be searched and the persons or things to be seized. Complexity and confusion

with respect to the seizure of pornography[3] arises as a result of the First Amendment overlay onto standard Fourth Amendment seizure requirements. The subtle differences attributable to the First Amendment overlay are made manifest through a comparison of the difference between the warrant requirements for the seizure of child pornography and adult pornography.

When the law enforcement branch of government initiates a seizure of adult pornography, a rebuttable presumption of non-obscenity exists. Thus, in addition to the normal Fourth Amendment warrant requirements that the law enforcement branch must observe before initiating a seizure, the First Amendment imposes a requirement to evoke some procedure which is designed to focus searchingly on the question of obscenity. *Fort Wayne Books, Inc.*, 489 U.S. at 62-63. *Accord, Marcus, supra; A Quantity of Copies of Books, supra; Heller v. New York*, 412 U.S. 483 (1973); *Lo-Ji Sales, Inc., supra; Fort Wayne Books, Inc., supra; New York v. PJ Video, Inc.*, 475 U.S. 868 (1986). Under that procedure, a neutral and detached representative of the judicial branch of government must apply the *Miller* standard[4] and conclude that

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[3]Pornography, as the term is used in this brief, shall refer to and include expressive materials (e.g., books, magazines, videos and films) which depict sexual intercourse, bestiality, masturbation, sadistic or masochistic abuse or lascivious exhibition of the genitals or pubic area (i.e., the type of subject matter typically proscribed by constitutional obscenity laws).

[4]Under the *Miller* standard, adult pornography is not considered obscene unless the average person, applying

the items for which seizure is authorized are obscene. *Lo-Ji Sales, Inc.*, 442 U.S. at 326-27. This Court adopted the *Miller* standard as:

> [A]n accommodation between the State's interests in protecting the 'sensibilities of unwilling recipients' from exposure to pornographic material and the dangers of censorship inherent in unabashedly content-based laws.

New York v. Ferber, 458 U.S. 747, 756 (1982).

In contrast, when the law enforcement branch of government seeks to seize child pornography, there is no First Amendment overlay onto the standard Fourth Amendment warrant requirements. In light of the State's heightened responsibilities and obligations for the protection of minors, this Court has not applied a presumption of non-obscenity with respect to child pornography, i.e., this Court has held that the *Miller* standard is not applicable to child pornographic expressive materials. *Ferber*, 458 U.S. at 764. As long as the category of sexual conduct which constitutes child pornography is suitably limited and described, child pornography is presumed to be obscene. *Id.* Thus, there need not be a prior particularized showing of obscenity before a

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contemporary community standards, would find that the materials, taken as a whole, appeals to the prurient interest, depicts or describes in a patently offensive way the sexual conduct proscribed by the applicable state law and, taken as a whole, lack serious literary, artistic, political or scientific value. *Miller*, 413 U.S. at 24.

search warrant may validly authorize the seizure of child pornography. *United States v. Dornhofer*, 859 F.2d 1195, 1198 (4th Cir. 1988).

The warrants at issue in this case contained the same degree of detail and particularity as warrants which have been held to be constitutionally sufficient in the context of a seizure of child pornography. Thus, the warrants at issue in this case complied with all of the requirements of the Fourth Amendment. The warrants described in considerable detail the places to be searched and the things to be seized. They also identified the criminal acts being investigated. The warrants adopted and incorporated the attached applications and affidavits of Taylor, which contained the detailed information concerning Taylor's investigative activities necessary for the United States District Court to confirm the existence of probable cause. The warrants identified with reasonable particularity the materials for which they authorized seizure. The warrants were issued by a neutral and detached Maryland judge. A search and seizure inventory was prepared which listed all of the items seized by the officers at each bookstore, and a copy of the inventory was provided to the bookstores. A copy of the inventory was also filed with the state court that issued the warrant. The warrants and the searches and seizures at issue complied with the mandates of the Fourth Amendment.

The alleged constitutional deficiency in this case arises from the overlay of First Amendment requirements onto the standard Fourth Amendment warrant requirements, i.e., the presumption of non-obscenity of adult pornography absent a *Miller* standard determination by a neutral and detached member of the judicial branch of government. To Taylor's

knowledge, there are no cases which apply this presumption in the context of a civil 42 U.S.C. §1983 claim for monetary damages.

The bookstores cannot prevail if the adult pornographic materials that were seized are obscene because the warrants in this case clearly met the requirements of the Fourth Amendment. The only arguably deficient conduct of the government defendants in this case was the alleged failure to evoke a procedure which provided the requisite searching focus on the question of obscenity. That First Amendment prerequisite is violated only if the materials that were actually seized were not obscene because obscene pornography is not afforded First Amendment protection. Thus, the viability of the claims of the adult bookstores hinges on the obscenity or non-obscenity of the items that were seized.

The only evidence upon which an obscenity determination can be made are the magazines, books, video film jackets and other seized items. All of the materials seized from the bookstores in this case (except for the items attached as exhibits to the Sheriff's Office Defendants' Memorandum in Support of Summary Judgment) were returned to the bookstores pursuant to an order of the federal district court. However, the adult bookstores, according to the testimony of LaVodie, one of the owners and managers of the stores, either burned or repackaged and sold all of the seized items that were returned without making any record of those items. The deliberate actions of the adult bookstores have caused the destruction and the spoilation of the only evidence from which an obscenity determination can be made. Those deliberate acts have precluded Taylor from proffering any evidence on the obscenity issue.

The adult bookstores should not be allowed to profit from their deliberate acts of destruction and spoilation of that critical evidence. Under such circumstances, the burden should be shifted to the adult bookstores to prove that the items which they destroyed were not obscene and, therefore, worthy of First Amendment protection.

The adult bookstores have been represented by the same counsel that is representing them in this civil lawsuit since no more than two weeks after the search and seizure operations giving rise to this litigation. The bookstores' counsel has argued from the outset that obscenity could be determined only upon a thorough examination of the seized materials. Nevertheless, the bookstores burned (destroyed) the seized materials shortly after those materials were returned to them. This destruction of evidence was not coincidental. It was a deliberate and intentional act undertaken to foreclose Taylor of any opportunity to overcome the presumption of non-obscenity.

Shortly after the current counsel for Taylor entered his appearance in this case, a copy of all of the seized materials that had been returned to the bookstores was requested. The bookstores have done everything possible to prevent Taylor from gaining possession of any of the seized materials, and the bookstores ardently urged the United States District Court to require Taylor to return all copies of the seized materials, including the materials attached as Exhibits 21-199 to the Sheriff's Office Defendants' Motion for Summary Judgment as evidence in this case. In fact, the adult bookstores, through their counsel, urged the federal district court to strike those materials from the summary judgment record.

The Sixth Circuit, in *Beil v. Lakewood Engineering and Mfg. Co.*, 15 F.3d 546 (6th Cir. 1994) and *Welsh v. United States*, 844 F.2d 1239 (6th Cir. 1988), engaged in a somewhat comprehensive analysis of the circumstances under which a party involved in the destruction of evidence should bear the burden of proof/persuasion with respect to the missing evidence. The Sixth Circuit concluded:

> Where one party wrongfully denies another the evidence necessary to establish a fact in dispute, the court should draw the strongest allowable inferences in favor of the aggrieved party. (Citation omitted.)

Welsh, 844 F.2d at 1247. The Sixth Circuit noted that there are two reasons for placing the burden of proof on the spoiler of evidence: An evidentiary rationale and a deterrent rationale. *Welsh*, 844 F.2d at 1246. The evidentiary rationale arises from the concept that a party who should know and appreciate the evidentiary value/possible relevance of evidence to litigation but nonetheless proceeds to destroy it is likely to be threatened by the evidence and, therefore, should have any negative presumptions from the evidence construed against the party and/or assume the burden of proof of a necessary element to which the evidence related. The deterrent rationale serves as a penalty, placing the risk of erroneous judgment with respect to the destruction of potentially relevant evidence on the party who destroyed it. A plaintiff who destroys evidence should be sanctioned just as surely as a defendant. *Beil*, 15 F.3d at 553. Moreover, where no evidence is available to establish an element of the plaintiff's case as a result of the plaintiff's destruction of evidence, it is

appropriate to grant summary judgment to the defendants. *Beil*, 15 F.3d at 553, n.1.

The bookstores' destruction of the seized materials has precluded the introduction of virtually any evidence upon which an obscenity determination can be predicated. If the seized materials were obscene, then none of the bookstores' constitutional rights have been violated because the warrants obtained by Taylor complied with the constitutional mandates of the Fourth Amendment.

In this case, in order for the bookstores to prevail, they should be required to prove that the materials (which were seized in compliance with the Fourth Amendment) are worthy of the First Amendment protection afforded under the *Miller* standard. In other words, the bookstores should be required to prove that the materials were non-obscene speech materials. Only if the materials are not obscene do the bookstores have any basis for claiming that their constitutional rights have been violated. Taylor should not be saddled with the burden of proving his non-culpability, i.e., that the materials that were seized were obscene.[5]

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[5]If the government defendants had destroyed the speech materials seized from the bookstores, then it would be appropriate to saddle them with the burden of proving that the seized materials were obscene because the destruction would preclude the bookstores from meeting their burden of proof. However, that is not what happened in this case. All of the materials seized from the bookstore (except the materials that were attached as exhibits to the Memorandum in Support of the Sheriff's Office Defendants' Motion for Summary Judgment) were returned to the bookstores.

With respect to the only materials still in existence and before this Court, a Harford County criminal jury applying the *Miller* standard has already determined that the materials are obscene. The warrants were not defective with respect to those materials, and Taylor is entitled to judgment on all claims predicated on those materials.

CONCLUSION

For the reasons set forth herein, the Petition for Certiorari should be denied.

Respectfully submitted,

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